Supreme Court, U.S.
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NO. 87-1056

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

WALTER PENDLETON,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF GEORGIA

REPLY BRIEF FOR THE PETITIONER

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PETITIONER'S BRIEF IN REPLY THAT A CONSTITUTIONAL CHALLENGE TO THE JURY CHARGE WAS PROPERLY RAISED IN THE COURTS BELOW

The Court of Appeals of Georgia specifically addressed the federal constitutional issue Petitioner seeks to have this Court review on writ of certiorari.

In Pendleton v. State, 184 Ga.App. 358, 361 S.E.2d 663(1987), at 664 the Court of Appeals held that "pivotal to this appeal are three jury instructions given by the trial court" and states, in pertinent part:

"Concerning the main charge on blood alcohol content, notwithstanding this court's previous approval of essentially the same instruction in Turrentine v. State, 176 Ga.App. 145(2), 335 S.E.2d 630 (1985), the appellant asserts that this charge (1) **violates the constitutional principle that the jury shall be the judges of the law and the facts**; (2) is inconsistent and conflicting, not to mention improper and insufficient; and (3) was impermissibly confusing to the jurors. **He contends that the charge on impaired driving ability, although taken directly from Lester v. State, 253 Ga. 235, 237, 320 S.E.2d 142 (1984), in effect instructed the jury to presume the defendant's**

blood alcohol level if the state was unable to establish this fact, and was impermissibly burden-shifting."

(emphasis added)

Although the appellant's brief in the Court of Appeals was lacking to some extent in clearness the Court of Appeals had no problem perceiving the constitutional issue raised by the appellant in his brief. A review of the cases the Court of Appeals cites in it's decision, Lester and Turrentine, clearly shows that those cases are inextricably opinioned on the constitutional due process issue of impermissible presumptions of guilt raised by this appeal. Additionally, the appellee uses these same cases in it's brief at pages 6-7 to

rebut the constitutional issues raised by this appellant.

The Court of Appeals of Georgia makes mention of the fact that trial counsel for the appellant neither objected to nor made reservations about these instructions, in response to the trial court's specific inquiry, and any objections were consequently waived. However, the controlling authority in Georgia is O.C.G.A. § 5-5-24 (originally § 70-207 of the 1968 official code of Georgia) which provides that a defendant in a criminal case may appeal and enumerate error on an erroneous charge without first raising the issue in the trial court.

In this case, an independent examination of state law shows that the state court did not follow any well-established procedural rule, and made an ad hoc determination operating discriminatorily against this particular litigant.

A reading of the holding in Harper v. State, 180 Ga.App. 20, 348 S.E.2d 318 (1986) cited by the Court of Appeals of Georgia reveals that it is based upon reasoning contained in Jackson v. State, 246 Ga. 459, 271 S.E.2d 855 (1980).

In Jackson, supra at page 459, the trial court **omitted** a charge on impeachment by evidence of prior felony convictions, the defendant did not request a charge on impeachment, and when asked at

the conclusion of the charge if there were any exceptions to the charge, defense counsel replied "none".

By comparison, in this case, the trial court included in it's charge to the jury the instruction allegedly waived.

There is a distinction between failure to request a charge on some collateral issue in the case and to object to omission thereof from the charge, on the one hand, and failure to object to the charge of the court as given, on the other hand. Thomas v. State, 234 Ga. 615, 618, 216 S.E.2d 859 (1975). Failure to request a charge on a collateral issue or failure to object to an omission to charge have precluded appellate

review of the issue, but failure to object to the charges given has fallen within O.C.G.A. § 5-5-24. White v. State, 243 Ga. 250, 253 S.E.2d 694 (1979).

In essence, the procedural requirement imposed by the Court of Appeals constitutes a novel approach to Georgia procedural law given that no previous state case has given notice of the existence of any such requirement. Novelty in procedural requirements, cannot be permitted to thwart review in the United States Supreme Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights. See Wright v. Georgia,

373 U.S. 284, 83 S.Ct. 1240 (1963) and NAACP v. Alabama, 377 U.S. 288, 84 S.Ct. 1302 (1964).

In the case at bar, the trial counsel's failure to object to the jury instruction does not constitute an "adequate state ground" for the state court's denial of relief so as to preclude the United States Supreme Court from reviewing the federal constitutional question which was also involved in the litigation before the state court.

Additionally, appellant respectfully submits that the state court has misapplied the decision of Turrentine v. State, supra and, Lester v. State, supra and, as more thoroughly set out in appellant's original brief as incorporated

herein, overlooked the fact that the trial court's charge to the jury on the effect of a finding of a blood alcohol reading of .12 or more created a constitutionally impermissible presumption of guilt in violation of this Court's holdings of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

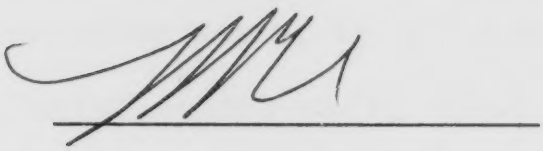
CONCLUSION AND PRAYER

The Fourteenth Amendment right to due process of law is a fundamental right, and review is warranted to impose consistency in accordance with this Court's established precedent. This Court's supervisory authority should be exercised to correct the error committed

by the trial court's jury charge. Review should be granted, and upon review, this case should be remanded for trial in accordance with those issues discussed here.

This the 3rd day of January, 1988.

Respectfully submitted,



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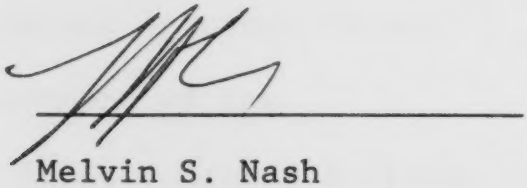
CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that in accordance with Rule 28.3 of the Rules of this Court three copies of this Reply to respondents brief in opposition to the petition for writ of certiorari were served on counsel for the opposing party, by placing them in the United States mail, first class postage prepaid, addressed as follows:

Mr. Philip M. Goldstein
Assistant Solicitor
State Court of Cobb County
Post Office Box 649
Marietta, Georgia 30061

This the 3rd day of January, 1988.



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Dennis R. Dunn

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132 State Judicial Building

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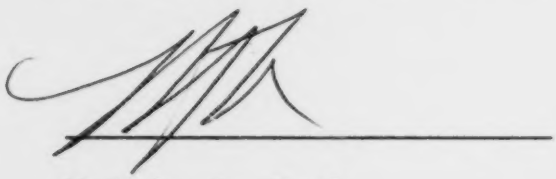
This the 3rd day of January, 1988.



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